

JK 273

• H3

Copy 1



---

---

**THE NATION THEY DIED TO SAVE**

---

---

AN ADDRESS

DELIVERED BY

EUGENE G. HAY

AT SUMMIT, N. J., MAY 30TH, 1912



UNDER THE FORM OF GOVERNMENT CREATED BY  
THE CONSTITUTION AND THE EXISTING MACHINERY  
FOR ITS ADMINISTRATION, THE PEOPLE CAN CONTROL

---

---

2. 05 1/2  
III 84 1/2

JK273  
.43

## ***American Democracy.***

---

Only two great governments have existed among men which came into existence at a given time with a written constitution. All others have been the work of evolution, and the charter of their liberties the patchwork of the centuries. The first was the Hebrew Commonwealth, which was organized on Mount Sinai with the Ten Commandments, written upon tables of stone, as its fundamental law. The second was the American Republic, with its Declaration of Independence and its Federal Constitution as the concrete statement of the rights, liberties, and powers of those who compose it.

The great genius who organized and established the Hebrew Commonwealth was inspired of God, and it may be said of that government that it has been the storehouse of wisdom and knowledge to which all nations have gone. History records the existence of no government among civilized men that has not borrowed from this great Commonwealth. The builders of our Nation borrowed liberally of the wisdom and knowledge of this inspired people, but the central thought which forms the essence of modern democracy was inspired by the New Dispensation which went from Galilee out among the children of men.

It has been well said that the philosophy of history can be understood only by one who is at least two generations removed from the men and events with which it deals. Time must have healed the wounds of party conflict and lifted from the arena of public events that mist and cloud of partisanship through

which things may be seen but indistinctly. This mist has yet scarcely lifted from the great Civil War, and the outlines of the mighty forces which have produced the unexampled material advance and progress of the American Republic since that era may be seen but dimly. The events, however, of the beginnings of the Republic, and the fundamental principles upon which it rests, stand out distinctly and are easily understood.

The central thought which underlies our government, the thought that pervades every line of the Declaration of Independence, the thought, the growth and development of which made that Declaration possible, is, that the inalienable possession of man is his right to determine by whom and how he shall be governed. Take from the Declaration of Independence the thought that the people are the ultimate repository of all political power, and it becomes idle words without meaning. The root of it all is that the individual is the unit of power, and the preservation of individual rights the highest function of government; that the individual is not made for, or to be governed for the good of the State, but that the State is the creation of the individual, for his benefit; that personal rights are inalienable; and that the State has just such powers as the individual surrenders to it. Of his rights the individual surrenders to the State just so much as may be necessary for the protection of life, liberty, and property, and the management of an orderly community. Out of this have been evolved the two basic principles of modern democracy: that government rests upon the consent of the governed, and that the majority shall control. These two principles must stand together.

## THE DECLARATION OF INDEPENDENCE.

The Declaration of Independence is short and may easily be divided into four parts, and its tremendous importance, not only at the time when it was adopted by Congress but for all time, is more easily understood by making this division:

First, It contains a statement of principles upon which the Colonial Congress based its action in declaring the independence of the Colonies.

Second, An argument in support of these principles, and the action which the colonists proposed to take.

Third, A statement of grievances or wrongs which the people had suffered at the hands of the government from which they deliberately determined to abjure allegiance.

Fourth, The formal Declaration of Independence.

In the first subdivision two comprehensive principles of government are laid down, and these two principles are the very source of the American Republic. They are:

First, That governments are instituted among men to secure to men their inalienable rights of life, liberty, and the pursuit of happiness.

Second, That governments derive their just powers from the consent of the governed, and that the people have the right to alter or abolish a government which is destructive of these ends.

There is, however, in the statement of grievances, a thought of tremendous importance. It is "He (referring to George III) has dissolved Representative Houses repeatedly for opposing with manly firmness his invasions of the rights of the people. He has refused for a long time after such dissolution to cause others to be elected, whereby the Legislative Powers, incapable of annihilation, have returned to the people at large for their exercise." No single statement ever made at any time has penetrated so deep into the true principles of popular



government as this. Every reform in government, from the rudest Barbaric Ages, has proceeded along parliamentary lines. The leading thought in all such reforms has been that in some sort of a legislative body should be vested the initiative; that every change in the government of the people must originate in the Legislature. As this reform has progressed still further we find growing the idea that the Legislature represents the people. This is followed by the doctrine that, since the Legislature represents the people, the people must select the Legislature; hence the legislative power is incapable of annihilation, but whenever destroyed it returns to be exercised by the people in whom, and in whom alone, it ultimately reposes. This thought stands as the everlasting bulwark of popular government. If the power or right to initiate cannot be annihilated, republican institutions, when once established, will endure until a majority of the people shall otherwise decree, or shall, through avarice, idleness, or the love of luxury, become indifferent to their rights and neglectful of their duties.

With this as the recognized fundamental principle of government, the founders of the American Republic framed the Constitution, having as their sole purpose the creation of the framework of a government in the operation of all of whose functions that principle was ever present. They divided that government into three several departments, each independent within its sphere, yet co-ordinate with each other in such way that the ultimate control of the people governed over those temporarily charged with the duty of administering those several departments, was never lost.

#### CRITICAL PERIOD.

The most crucial and critical time for the American Republic was the years that elapsed between the close of the Revolutionary War and the final establishment of Constitutional government. The dangers which then



threatened grew out of the jealousy of the people of their personal rights—a fear they entertained that in any form of government which might be adopted they would unwittingly surrender some of those rights of civil and religious liberty for which they had fought, and the protection of which they believed was the highest office, and should be made the chief object of such government as they should adopt. They knew that the political history of the nations recorded two dangerous facts: that political leadership fostered ambition, and that ambition fed on power. Their want of confidence in their leaders was not personal, but was encouraged by almost every page of the history of other nations, and they were determined that they would not readily yield assent to any form of government, lest, in their haste, their rights would not be securely guarded. In this feeling, never yielding and growing stronger through the years, there was the gravest danger that no stable government could be established, and that naught but anarchy would follow independence. But out of it order came, and the strongest, freest, best government of the world was established.

#### POLITICAL POWER INHERENT IN THE PEOPLE.

While the doctrine, that all political power is inherent in the people and may only be exercised upon their consent, was not new, to make it the foundation stone of a great nation was revolutionary, and a radical departure from the hereditary governments of Europe. Lincoln said, "No man is good enough to govern another man without that other man's consent." All other theories of government, in their final analysis, are self-assumed superiority and self-assumed power. The seductive selfishness of this doctrine persuaded Cæsar to cross the Rubicon, but it failed to tempt Cincinnatus; yielding to its temptation, the First Consul became the Emperor Napoleon, and died in banishment and misery; resisting

it, George Washington became the demigod of liberty and died the most loved man in all the world. It means the consolidation, rather than the diffusion, of power. Through the selfish ambitions of men, consolidated power always leads to oppression; diffused power operates as a check upon these selfish ambitions and preserves the liberties of the people. That no man is good enough to govern another man without that other's consent will be true until selfishness shall be eliminated from mankind, and in that day governments among men will cease to be a necessity. It was to best promote, and embalm forever in the institutions of an enduring government, this great fundamental principle that the makers of our Constitution aimed. Is the principle itself worth while, and did the Fathers succeed in giving it perennial expression in the Constitution, is a question which in these days is brought home to us, and one which we should at all times be willing to investigate and answer.

#### THE GOVERNMENT CREATED BY THE CONSTITUTION.

##### *The Legislative Department.*

Our government is essentially a parliamentary government. In the Constitution the Legislative Department is given the first place. I mean by this it is first enumerated. Besides this, it has the power of initiative relative to all laws and all public matters, the sole power of determining national policy, and the sole power of appropriating money. Not one dollar of public money can be expended except upon express appropriation by Congress. It has full control over the Executive and the Judicial Departments, in that it may withhold appropriations. It has the further power over the Judiciary in that it makes, and can unmake, all courts inferior to the Supreme Court, which is created by the Constitution; and as to the Supreme Court it is given by

the Constitution the power to extend, limit, or cut off its appellate jurisdiction. This, however, is a power that Congress has never exercised, or at least never except in the most limited degree, and in a way to increase, rather than curtail the power of the Judiciary. Congress could, however, under this power, completely destroy the most important functions of the Supreme Court. But Congress, coming directly from the people, would never do this except upon the most positive and direct mandate from the people. The history of our country, however, records no instance when Congress has failed to respond to the clear and positive mandate of the people. As we proceed further, it will be seen that, through Congress, the people also have at all times complete control of the Executive. A Congress in which is vested all power of initiative, and which must return biennially to the people for a new lease of power, forms the surest possible guaranty that the rights and liberties of the people cannot be infringed for any length of time, except by the people's consent.

### *The Executive Department.*

The executive power of our government is vested by the Constitution solely in the President. While this power is very great, it is confined by the Constitution to a very limited field. First: He is the Commander-in-Chief of the Army and Navy of the United States and of the Militia of the several States when called into the service of the United States. Congress, however, decides what that army and navy shall consist of, how it shall be organized, officered, and paid, and not one dollar can be expended in this branch of the service except upon an express appropriation by Congress. It will therefore be seen that, while the President's actual control over our army and navy is absolute, the potential control is always with Congress. The President has power to pardon all offences committed against the

United States, except in case of impeachment. Over this power there is no control by Congress. He has a joint power with the Senate to make treaties, and with the advice and consent of the Senate to appoint all administrative and judicial officers, officers of the army and navy, and foreign representatives. He may recommend laws and other measures to Congress, may convene Congress in extraordinary session, and, upon a disagreement between the Senate and the House as to the time of adjournment, he may adjourn them to such time as he deems proper. He may veto the bills passed by Congress, but Congress may by a two-thirds vote pass them over his veto. It is his duty to receive all representatives of foreign governments, and to see that the laws of the United States are faithfully executed.

This comprises the entire power of the President of the United States. You will have observed that there is a potential power greater than his in every function of government save the pardoning of criminals, and the enforcement of the laws. This latter is the most important function of the President, and the one upon which, more than all executive duties, depends the life and happiness of the citizen, the safety of his property, and the perpetuity of the government. The Congress makes the laws, the Court interprets them, but if the Executive fails to enforce them, the government fails, property rights are lost, liberty perishes, and anarchy takes the place of order. It is in this respect that we know most about the Executive Department of our government—about the President. For the discharge of this function the Executive Department is divided into nine subdivisions, each is presided over, and its work generally supervised and directed by a Cabinet Officer. These Cabinet Officers are selected by the President, and are responsible, not to the people, but to the President for a faithful discharge of their duty. The President alone is responsible to the people for the faithful administration of every branch of the Executive Depart-



ment; but, as the people elect a President every four years, we can have bad government but a short time if the people are alive to their civic duties. Here again is to be found the wise potential power of Congress. The President or any of his Cabinet members, or any Judge of the United States can be removed if guilty of treason, bribery, or other high crimes and misdemeanors on conviction in an impeachment proceeding. Under the Constitution the House of Representatives has the sole power of impeachment.

### *The Judicial Department.*

Having considered briefly the Legislative and the Executive, we come next to the last of the three departments of government in the order in which they are named in the Constitution.

In the language of the Constitution "The Judicial power of the United States shall be vested in one Supreme Court and such inferior courts as Congress may from time to time ordain and establish." This language is followed by what all thoughtful writers have found the wisest provision in our Constitution, and the one upon which has depended, and forever must depend the safety of life and property, and the preservation of our institutions. It is that the Judges of the Supreme Court and of all inferior Courts shall hold their office during good behavior, and that their salaries shall not be diminished during their continuance in office; thus bringing that department of government which has the last say on every important matter, as far as human beings can be brought, above and beyond all sordid influence. The only remaining thing that the Constitution does with reference to the Judicial Department of the government is to define the judicial power of the United States, and fix the metes and bounds of the jurisdiction of the United States Courts. The Constitu-

tion provides that the judicial power shall extend to all cases arising under the Constitution or the laws of the United States. This necessarily involves the duty of construing the Constitution and setting aside all laws of Congress and of State Legislatures that may be in conflict therewith. This is a feature in our government that is unique and renders it different from any other government that ever existed. While the Constitution gives the greatest power to Congress, and in almost all respects leaves with it the potential power, it places the Supreme Court on perpetual guard over the Constitution.

It will be seen from this brief review that our Constitution provides but the foundation and framework of governmental structure, leaving all detail to the people, through Congress, as from time to time may be required by changing conditions. So profound was the work of those who laid that foundation and erected that framework that it consists of principles as unchanging as human nature, and any departure from them utterly changes our form of government.

#### WHEREIN THE GOVERNMENT HAS FAILED AND SUCCEEDED.

As I have read the history of my country, both on its written pages and in almost forty years of observation of its workings, I am convinced that the fear of the people that caused their hesitancy in the formation of the government was well grounded. It was the executive power which they feared. Of the three co-ordinate branches of the government, the one that has proven least successful in the full discharge of the functions devolving upon it, is the Executive. It is the department, too, that has shown the most inclination to depart from its true functions and usurp or control those of the other departments. Had the Executive Department adhered as closely to its constitutional prerogatives and duties as has the Congress and the Courts;

had the laws been enforced as faithfully, as intelligently, and as impartially as they have been in the main sound and wise, or as they have been truly and impartially interpreted, our government would have far more nearly realized the ideal of the founders. The enforcement of the law, which, as I have pointed out is the one important function of government left by the Constitution solely to the Executive, is the respect in which our government has most signally failed. It is true that it is the most difficult duty and the one which presents the most temptations to neglect. Our Executive, with his thousands of subordinates, has uniformly looked forward to the coming election, and he and they would be more than human if they were not, to some extent, influenced in the discharge of their duty by this outlook. Upon the ground of human nature, we must extenuate this fault, grievous though it is, for the circumstance out of which it grows ever has been, and ever will be, the weakness, while it is at the same time the strength, of our government.

There is another respect in which the Executive Department has frequently, though not probably uniformly, failed; for which there is no excuse or extenuating circumstance. That is, in not confining its activities to its constitutional duties. Few men have held legislative or judicial position under the Federal Government who have not felt the pressure of executive influence. Such pressure, when exerted, is usurpation; it is unpatriotic, and comes near to the border line of malfeasance. In so far as a legislator or judge yields to this pressure, he is unworthy; to resist it stamps him as a man of heroic mold, and in one respect at least, and a very important one, fits him for the discharge of high public duty.

The Legislative Department comes direct from the people. Every two years the entire House of Representatives and one-third of the Senate come to their duties with the people's mandate fresh in their minds. In the main, Congress has responded with wonderful



alacrity to popular opinion. It has exercised the people's power with wisdom and courage. Our laws have quite generally been the concrete and refined expression of popular will, and they have been quite generally sound, temperate, and wise. As the holder of the purse strings, Congress has been a faithful steward. If the Executive Department had been as honest and as careful in the expenditure of public money as Congress has been in its appropriation, we would have little occasion to complain of extravagance or corruption. It is true that no money can be expended until it is first appropriated by Congress, but for its information as to the need of the appropriation, Congress must depend upon the Executive Department, and the details of the expenditures after the appropriation is made, in all the vast fields of government activity, must of necessity be looked after and attended to by the Executive Department. While I think the thoughtful student of our country's history will conclude that Congress has, taking the years together, performed with fidelity and wisdom the legislative or parliamentary function of the American Republic, it is in our Judiciary that we find the highest fulfillment of the loftiest hopes of the votaries of Democracy. Edmund Burke, the most profound of English statesmen, has said, "Whatever is supreme in a state ought to have as much as possible its judicial authority so constituted as not only to depend upon it, but in some sort to balance it. It ought to give security to its justice against its power. It ought to make its jurisdiction as it were something exterior to the state." We have come nearer than any other nation ever has to realizing Burke's ideal, perhaps as near as a republic can or ought to come. Our judicial system does give security to justice against power; but its jurisdiction is not exterior to the state. As I have pointed out, the people through Congress can control that jurisdiction; but its jurisdiction and the Court, when once appointed, are completely separated from the Executive

power. All thoughtful students of our institutions have expressed the most profound admiration for the manner in which our Judiciary has been by the Constitution placed beyond the influence of the other departments of government. It is absolutely unique in that respect. The President can exercise no more power or influence over it than the humblest citizen. Congress can not diminish the salary. The tenure and the independence of a United States Judge is dependent solely upon his own good conduct. De Tocqueville says that "A more imposing judicial power was never constituted by any people." Brice calls it "the living voice of the Constitution." Lord Brougham said of it: "The power of the judiciary to prevent either the state legislature or Congress from overstepping the limits of the Constitution is the very greatest refinement in social policy to which any state of circumstances has ever given rise, or to which any age has ever given birth." Webster, our greatest constitutional lawyer, called it: "The great practical expounder of the powers of the government. No conviction," he said, "is deeper in my mind than that the maintenance of the judicial power is essential and indispensable to the very being of this government. The Constitution without it would be no Constitution—the government, no government. I am deeply sensible, too, and, as I think every man must be whose eyes have been open to what has passed around him for the last twenty years, that the judicial power is the protecting power of the government. Its position is on the outer wall. From the very nature of things, and the frame of the Constitution, it forms the point at which our different systems of government meet in collision, when collision unhappily exists. By the absolute necessity of the case, the members of the Supreme Court become judges of the extent of constitutional power. They are, if I may so call them, the great arbitrators between contending sovereignties." Mr. Carson, in his authorized history of the Supreme Court places upon the

reverse side of the title page the splendid tribute of Mr. Horace Binney, a distinguished citizen of Philadelphia, who said: "It is the august representative of the wisdom and justice and conscience of the whole people, in the exposition of their constitution and laws. It is the peaceful and venerable arbitrator between the citizens in all questions touching the extent and sway of Constitutional power. It is the great moral substitute for force in controversies between the people, the States, and the Union."

While the judicial power, the jurisdiction of the Court, and the tenure of the Judges as fixed by the Constitution has been the important factor, the high character and ability of the personnel of the Court, particularly in the early day of the Republic, has been a powerful influence in making the Judiciary the most successful of the three co-ordinate branches of our government. From the administration of John Adams to that of Abraham Lincoln, for a period of sixty-three years, the great office of Chief Justice was filled by but two men. The former of these, John Marshall, who was Chief Justice for thirty-four years, in his long service exercised a more profound and beneficent influence in shaping our institutions than any other man in our history. He was a man whose character it has been said "is the most exquisite picture in all the receding light of the early days of the Republic."

Thus I have briefly sketched the form of government which constitutes the nation the men, whose graves we decorate to-day, died to save. De Tocqueville says of it: "The most profound minds of Greece and Rome were never able to reach the idea, at once so general and so simple, of the common likeness of men, of the common birthright of each to freedom." Gladstone said of our Constitution that it is "the most wonderful work ever struck off at a given time by the brain and purpose of man." And another distinguished and thoughtful foreigner has said that the American Republic has that

form of government "toward which, as by a law of fate, the rest of civilized mankind are forced to move, some with swifter, others with slower, but all with unhesitating feet."

Saved through the awful tragedy of civil war, shall this nation perish through the selfishness of peace? Shall the dreadful picture of the "Deserted Village" be spread across the face of our fair land?

"Trades proud empire hastes to swift decay,  
As ocean sweeps the labored mole away!  
While self-dependent power can time defy  
As rocks resist the billows and the sky."

#### THE PEOPLE CONTROL.

In this brief statement of governmental functions existing under the Constitution I have entirely failed of my purpose if it has not been made apparent that to-day, and every day since the adoption of the Constitution, the people have had absolute control of all the machinery of government. It is not the control of the mob, but the control of the fireside which the Constitution provides for. Our government cannot be affected by lurid resolutions passed at Cooper Union, nor at an excited gathering in Nebraska. But whenever about the fireside of the American home any great question is considered deliberately, as it could only be considered in that citadel of political power, the result of that deliberation will find voice in the ballot box, and every department of government will respond as promptly and as surely as nature responds to the genial influence of spring. Those who seek a speedier method know not what they do. Righteousness abides not in passion and in prejudice, and he who sows the wind must surely reap the whirlwind. No substantial reform was ever wrought by the hurricane or the cyclone—their power is destructive; not constructive. From the dawn of civilization every reform has moved with slow and de-



liberate purpose. It was two hundred and ninety-eight years from King Alfred to King John; but the leaven of liberty was working all those years and there came the great Charter of England. It was five hundred and sixty-six years from Runnymede to Yorktown, and the American Republic was born of the travail of these years.

We are living in an impatient age; but if we would preserve our liberties, if we would preserve the great underlying principles of popular government, we will hesitate long before we consent to any change in the scheme of government which the Constitution creates. It is worse than folly to say that under that form of government everything goes right; that the people have not to-day a cause of complaint. They have—and a grievous one. But, can we not, by the slow and orderly working of present government machinery, arrive at a remedy far more effectual than by any of the methods for speedy action that have been proposed? The people have it in their power to do so without changing their machinery whenever they determine what they want to do.

#### EQUALITY OF OPPORTUNITY.

That all men are created free and equal is the doctrine of the Declaration of Independence. This is frequently ridiculed by those who take but a superficial view of that dogma; but to those who look to the true meaning of these words and find in them the thought that all men come from their Creator with the right to freedom and the right to an equal opportunity in life, it is an eternal truth. Has the form of government created by the Constitution produced that condition in the American Republic? Every child born under the American flag unquestionably inherits the largest measure of freedom that is consistent with organized society. But, does every man under the flag have an equal opportunity in life, is a question not so easily answered.

For more than thirty years there has been a growing belief that he does not, until that belief has become a conviction that has produced an almost universal unrest, and, in some way, the government is held responsible for this condition. That is, it is quite generally believed that those entrusted with power have either, by what they have done or what they have failed to do, brought about this condition; and I fear we are too prone from this premise to jump to the conclusion that this is the fault of the scheme or system of government. Those who have most carefully analyzed present day conditions I believe quite generally reach the conclusion that through our laws, their interpretation or their administration, special privileges have been granted to the few not enjoyed by the many, and thus the guaranty of equal opportunity has been violated, and that equal opportunity no longer exists. With their conclusions I am not disposed to find fault; but to undertake to remedy a political condition, without accurately ascertaining its cause, is folly.

#### THE TARIFF.

There are a great many very respectable and intelligent men who lay this condition entirely to our tariff laws. The fact, however, that the condition has come into existence within the last forty years, and that a protective tariff was the first law passed by the first American Congress, and that high protection has been our national policy from the beginning, tends to discredit this diagnosis. I would not be understood by this as believing that our tariff laws have always been just or right. They have not, and have sometimes been inexcusable. But, from them have sprung to a very limited extent, if at all, the inequality of opportunity which furnishes so just a ground of complaint. I recently saw it stated that fifty years ago there were but twenty-seven rich men in the City of New York: the

richest of these was worth six millions, and but a few of the others were worth to exceed a million, their combined wealth being less than one-half that of any one of a dozen men in that metropolis now. Yet at that time we had been under a protective tariff for seventy years. In the State where I was born and brought up, one of the most prosperous in the middle West, there were but two men forty years ago who were rated as worth a million dollars. Within the last five years a citizen of that State died whose estate was reported to amount to fifty-six millions of dollars.

#### INEQUALITY OF OPPORTUNITY AND CONCENTRATION OF WEALTH CORRELATED.

There is no political economist but believes that the inequality of opportunity and the rapidity with which in the last half century the wealth of the world has been concentrated in a few hands are correlated. It is this condition that has brought about all of the ephemeral political movements that have flourished with such spasmodic hysteria, from the Greenback and Free Silver Movements, to the Recall and Referendum. The Granger Movement, the Greenback and the Free Silver Agitation, the Populist Party, the War against the Boss in Politics, the Election Reforms, the Recall and the Referendum, were and are, all of them, attempts on the part of those who advocate them, who believe in them, to alleviate the condition of the great mass of the people. All of these political movements have, it seems to me, as I have watched them through the years that they have flourished, simply scratched the surface of things and have not gone deep enough to find the source. It was apparent that the great mass of people did not have their share in the country's wealth, nor even in the wealth that their industry and their energy produced. Hence it has at various times been proposed to print more greenbacks, coin more silver, organize the masses



against the classes, drive the boss out of politics, bring the Government nearer to the people—all for the purpose of relieving an evil condition that was perfectly apparent but without, as I believe, fully understanding, or at least appreciating, the cause.

We have learned that to increase the volume of money without increasing its value simply decreases its purchasing power and increases, rather than relieves our trouble. We have learned, I hope, that class hatred can serve no other purpose than to undermine social order, destroy domestic happiness, and lead eventually to anarchy and revolution. We have learned—or, if we have not, we will before we are many years older—that when we drive one boss out of politics we let another in, and political conditions are but little, if any, improved, and if at all for but a brief season.

#### INITIATIVE AND REFERENDUM.

We are now told by a certain class of thoughtful men that the initiative and referendum is the remedy for our troubles, and by others, not so thoughtful, that to rid ourselves of our political troubles we must abandon the representative democracy created by the Constitution, and change our form of government to a pure democracy, by abandoning party government, surrendering all the checks and balances of representative democracy, and permit the people, without deliberation, to settle all questions pertaining to society. For this it is my deliberate judgment is what the primary election, the direct election of Senators, and the recall, before the expiration of their terms, of public officers guilty of no offense amounts to. The principal objection in my judgment to the initiative and referendum is that it is an impractical and unworkable form of what we already have in a practical and workable way. The initiative, as I understand it, is that the people shall by some method not yet clearly thought out, take the initiative

in legislation. This they may do now in the most practical way by making such legislation an issue in the election of legislators and congressmen. The referendum, as I understand it, is a method by which laws after enactment by a legislative body shall be submitted to the people at a general or special election, and not become operative until approved by a majority vote of the people. The objection to this is that it is cumbersome and unnecessary. The people have neither the time nor the inclination to examine the technicalities of an enactment sufficiently to understand it. The theory of our government is that they delegate to representatives this duty and labor. It is unnecessary, because the history of our government shows that legislators respond quickly to the will of the people when they make that will known; and the people can, whenever they are sufficiently interested, secure the passage or repeal of any law which they approve or condemn, by the very simple process of making their wish known by electing representatives in harmony with their will. It takes neither great knowledge nor vivid imagination to see that, except in very small communities, and upon questions of purely local interest, direct legislation is impossible.

#### PRIMARY ELECTION.

There is now a very general demand for a general primary election. That is, the selection by popular vote of all candidates to be voted for at the general election. This demand is so almost universal that few men engaged in active politics dare oppose it, whatever may be their convictions. I believe it is ephemeral. More surely than any one of the fashionable political reforms of the day will it, when carried to its logical conclusion, be destructive of representative democracy; and I do not believe the people are yet ready to change their form of government. To me there are several very serious objections to it. First, it affords a splendid field for

the demagogue. Second, the element of deliberation that is afforded by the convention system is in it entirely lacking. Men have no opportunity of conferring together and, through consultation, reaching if possible a wise conclusion as to who is the best man to place in nomination for this or that office. It is as if the people undertook, without the intervention of the legislature or Congress to adopt laws for their government. The merest tyro can see that in a community composed of more than a hundred people this would be impossible. Third, the primary election system, once generally adopted, will deprive every one but the very rich, and an occasional blatant demagogue, from holding public office. I scarcely believe we want to turn our government over entirely to this class. At a primary election a man must depend entirely upon his own efforts. He has no political endorsement, no political organization to help him, and the best-advertised man is almost certain to win. Advertising costs money—it costs a great deal of money. In a large constituency no man can reach either with his hand or his voice any large proportion of the voters. The system therefore gives in my judgment an undue influence to advertisement in every form. A very few men have the knack of getting a great deal of free advertising, but the most of men have to pay for it; and, while there are exceptions, the most of publications want to be paid for it, whether it is advertising an automobile, a patent medicine, or a candidate for office. So, as surely as “the longest pole knocks the persimmon,” so the longest purse, under this system, will get the office in the majority of instances. If that purse is the candidate’s own it is bad enough; but not half so bad as if it is provided by those who seek to benefit through his administration of the office he seeks. For, while there is more altruism in politics than in any other field of human endeavor, with the possible exception of religion, it seldom takes the form of financial aid. Money is never altruistic. The fourth objec-

tion, and the one most serious, is that it destroys political organization. No system has yet been devised that will prevent one party from influencing the nomination of its adversaries, and thereby weakening its efforts at the general election. A democratic form of government is essentially a party government. That is, people unite themselves in political parties, compromise their differences, and, through the party convention, give expression to their beliefs as to legislation and administration. The members of the party in each small political subdivision select men to represent them as delegates in convention, there to harmonize minor differences and select men to go before the people at a general election as representatives of their aggregate views as to political policy, local, State or National. Carry the primary election to its logical conclusion, to which it already has been carried in some States, and party lines are entirely broken down and political parties destroyed. It amounts to two elections, in neither of which does any candidate represent any set of principles to which any body of the electorate has given deliberate approval; but represents only himself, and, after elected, may interpret the people's mandate as he pleases. Add to this the recall, and we have strife and turmoil as our daily diet, and order and repose have gone from us forever. If we do not wish to carry the primary election to the extent of destroying political parties, if we mean to preserve party government and keep the primary contest within the party, then it is utterly unnecessary. I believe the members of a political party should have the very freest opportunity of deciding what shall be the party principles and who shall be the party candidate, uninfluenced by the demagogue and uncoerced by the boss. This they can do under the convention system through which we have operated for almost a hundred years. The recent political history of a neighboring State affords proof of this far stronger than any mere statement or theory, however logical. There is no State



in the Union where party organization has been carried to a higher degree, or has been more arrogant, nor where the boss has had greater power, than in the State of New York; yet under the old convention system, and with the party organization and the party boss and sub-bosses in complete control, Hughes was twice nominated for Governor, unquestionably against the wish of the bosses, at least of those who had any sinister purpose in their political activity. He was nominated because the people, that is, the rank and file of the Republican Party, were for him and demanded it. Again, in the same State only two years ago, a superb political leader under the convention system, by appealing to the people, overthrew the bosses great and small, and gained complete control of the party convention. Whenever under the old system the people failed to control the affairs of our government, it was because they neglected their opportunity, neglected their duty, and this will be the case under any system the wit of man can devise.

#### THE RECALL.

The fact that we frequently hear the same men urging a longer term for President and the recall of all public officers illustrates, not only the inconsistency, but the order-destroying tendency of some modern so-called reforms. If we are to adopt the recall of public officers who have committed no offence, or at least who have not in some orderly proceeding been convicted of some offence, and give proper attention to our civic duties, we will have little time left for earning a living. With the exception of Judges and those occupying quasi-judicial positions, the terms of all public officers are very short. In every political subdivision of our country, from the city ward and county township to the National Government, there is a provision for the removal of all public officers who are guilty of malfeasance or neglect of duty. This of course may only be done

after, in some orderly proceeding, they are ascertained to be guilty. Every person under our flag has the right when accused of an offence to a fair and impartial trial. I scarce believe we wish to make an exception of those whom we select to administer any of the functions of our government, City, State, or National. If we do not, the recall is unnecessary and mischievous.

I make but little difference between the recall of Judges and the recall of other public officials elected by the people. Fundamentally they are equally bad. I agree that we should not make a fetish of the judicial office. Like all other public officials, Judges are selected to perform the people's will, but to perform it in accordance with rules which the people have adopted, not in accordance with the passing fancy or prejudice of some of the people, nor of all of the people, unless deliberately expressed by changing the rules. It is true that more than other public officials the Judge should be independent of all sordid, improper, or impulsive influences. Upon his decisions hang the life, the liberty and the property of the people, and his decisions should always be his deliberate, unbiased, uninfluenced judgment. But this is true, only in a less degree, of all public officials. The Judge should never be permitted to think that he is something above and beyond the people whose work he does. It is true that the work he does for the people is more technical in character than that done by other public officers, and those untrained in the legal profession are less able to understand the legal principles which may be involved in any given decision than they are the service rendered them by a legislative or executive officer. But this, so far as I know, is the only sound argument that may be made against the recall of Judges that may not be made against the recall generally.

## CHANGING FORM OF GOVERNMENT, OR MACHINERY FOR ADMINISTERING IT, AFFORDS NO REMEDY FOR EXISTING EVILS.

I have endeavored to fairly consider all of the more generally discussed remedies for the condition which now unquestionably exists, that is, for the inequality of opportunity which has grown up under our flag. I believe they are all a step backwards, and tend to destroy rather than to promote the safeguards of liberty. If, however, we should adopt any or all of the remedies I have discussed, revolutionary though they are, I am unable to see how they would remedy the evil. With the initiative and referendum in full operation, what law would we get that would change the situation? With the primary election and the recall of Judges and of all public officers, what administration or interpretation of the laws would we have that we do not have now? Those who advocate these measures suggest none. The changing of the method by which laws are enacted, or the method of selecting officials or controlling them would not, in itself, afford a remedy.

## THE SPECIAL PRIVILEGE WHICH CREATES INEQUALITY OF OPPORTUNITY.

I am profoundly convinced that this inequality of opportunity results from special privileges that have been given by law to the few, which the many do not and can not enjoy—by the laws, not, however, of the National Government, but of many of the States; and the people can, whenever they have a mind to do so, correct the evil, and that without making the slightest change in our form of government or the method by which public business is attended to. The responsibility for doing this is with the people, and with none more than with the people of New Jersey.



## THE CORPORATION LAWS OF THE STATES.

At the time of which I spoke a moment ago, when there were but twenty-seven rich men in the City of New York, the commerce of New York and of the country was done by the individual. If that were true to-day, the number of millionaires in that City and in the country would have increased only in proportion and ratio with the increase in population and general development of National resources. We all know this is not the case. The special privilege which has brought about the concentration of wealth in the hands of a few and consequent inequality of opportunity, is that afforded by the corporation laws of many of the States, and in this New Jersey has been the chief offender. But in the wave of reform of which we have heard so much in this State in the last few years, I have observed no tendency toward a reform of the corporation laws. These laws tend to create a commercial despotism more intolerable and more dangerous to liberty and happiness than any political despotism that ever flourished under the sun. I am not a corporation baiter. It is a most useful agency of commerce, and in the present day an absolutely necessary one. But it is also susceptible of development that will make it a danger to the state—in fact it has already become so. There are many businesses that can be carried on only by large aggregations of capital, and this is best effected by means of the joint stock company or corporation. The corporation is a fictitious being, that is, it is a creation of the law. Before the special legislation of the various states enlarged it, the corporation was so confined by the common law and its interpretation by the Courts as to afford every opportunity for the conduct of such large undertakings as required this medium of commercial intercourse, but did not permit it to create a monopoly, or trust as we now call it, and

become a menace to the state and the people. To-day, under the statute law of forty States, corporations may be organized to carry on any kind of lawful business. In forty-one States there is no limit placed upon the capital stock of a corporation. In twenty-four States perpetual charters are permitted by law. In seventeen States the merger or consolidation of corporations is specially provided for by law, and in only two States is it prohibited. In only two States is the holding of stock by a corporation in another corporation prohibited, and in nineteen States this power is expressly given. In thirty-nine States the statute law makes no provision that the capital stock of a corporation or any part of it shall be paid in money, and in twenty-one States charters are granted to corporations without requiring them to hold their meetings within the States, or requiring that the directors or officers shall be residents of the State.\* Every one of these provisions of State laws constitutes a special privilege granted to those to whom charters are issued, the effect of which upon society is not yet understood, and in my humble judgment can not be overestimated. These State laws did not emanate from the people, but in almost every instance were enacted, sometimes through the corrupt, and always through the undue influence of those interested. That I may not be misunderstood, nearly all of the various provisions in the corporation laws to which I have referred were prepared by corporation lawyers in the interests of their clients who wanted to use them to exploit the people, either in the sale of stocks, or in securing the control of some line or all lines of business, and to be able to do this with the minimum of risk to themselves. I think it fair to say that in the large majority of instances they were procured, not by corrupt means, but from legislatures the members of which had but little or no understanding of the far-

---

\* Address of Hon. Edgar H. Farrar, President American Bar Association, August 30, 1911.

reaching effect of the laws they enacted. It is under the fostering and sheltering care of these laws, and not as a result of natural development, that organization and consolidation in business has become the watch-word of the hour. It is easy to see how, under these laws, corporations may be organized that will become stronger than the government. In fact there are corporations and combinations of corporations in existence to-day that exercise a far greater influence over the daily lives, the happiness and prosperity of the people, than does the government itself. And yet, with this threatening danger before us, we rest supinely oblivious to it, while we excite ourselves about dangerous or unimportant changes in our form of government, or the method of transacting public business; and yet, under the present form of government and the present machinery for transacting public business, the people have it in their power to destroy this special privilege which is gnawing at the vitals of national life. The trouble is that under these laws there have come to be great vested interests that are widespread among the people.

#### A FEDERAL PROBLEM.

The State legislatures are the theaters in which this reform should be enacted; but this will never be. Such would require the concordant action of the States. It was the impossibility of this that brought about the formation of the Federal Union, and there is certainly no more probability of forty-eight States acting in harmony than there was of the thirteen Colonies. But under the Commerce Clause of the Constitution, the Federal Government can, and I believe eventually will, remedy this evil. We have on the Federal Statute Books to-day a law which denounces as unlawful the acts of thousands of corporations whose every act is authorized by the laws of the States creating them. Thus, through the operation of our dual governments, we have laws

that are equivalent to selling a man burglars' tools, and then punishing him for using them. This is a problem with which the Federal Government must deal, and must deal by constructive legislation. The Anti-Trust Law as a remedial and penal statute is as near perfect as the wit of man can devise; but it pretends only to destroy; it does not reach the source but deals only with the condition.

#### SOCIALISM.

The most minute study of the history of the commerce of the world, from the Phœnician traders upon the Mediterranean down to the present hour, reveals but two forces that can control that greed and ambition which are the great moving power in commerce. The one is law, and the other is competition. To control it by law leads to socialism. The theories of socialism are as many as the individuals that hold them. One thing, however, is common to them all. It is, that the distribution of the proceeds of labor is a governmental function. That is, that the individual is nothing; that the community is everything; and that whatever wealth is produced by the labor of the individual becomes the property of the community, to be distributed to all the individuals that compose the community by some authorized agency of the community. The regulation of interstate commerce by laws which, either in terms or through a governmental bureau, seek to establish and compel co-operation, leads therefore unerringly to socialism. Co-operation, except it have the sustaining power of the law, must prove a snare by which capital will more firmly fasten its hold upon labor, or will go the way of New Harmony and Brook Farm. To foster and control the trusts, therefore, if the control is to be effective, means to go deep into all interstate business, to regulate the capital stock, the wages of employees, and the profits. This would be effectually distributing



the proceeds of labor, and would logically lead us into socialism and change our form of government in fact, if not in name. Representative democracy is based upon individualism, and experience teaches that this can only exist where there is free and open competition.

#### THE REMEDY.

We must, however, and eventually we will by express Federal law, permit to engage in interstate commerce only such corporations as are prohibited from acquiring or owning the property or stock of another corporation; from having, as officers or directors, men who are officers or directors of other corporations engaged in the same or a similar line of business, from doing any business until their capital stock is paid in full in money or property of equivalent value; and prohibit them from entering into any contract or agreement with another corporation, copartnership, or individual which, directly or indirectly, interferes with free and open competition. When we do this we will have restored competition to the commerce of our country, which has been destroyed, not by the operation of the natural laws of trade, but by the stifling of those laws by the statutes of the States. This being done, we will have cut the leash that has so long held in check the operation of the economic law of supply and demand, and annulled the special privilege which has destroyed the equality of opportunity which all should enjoy under our flag.

This will be done whenever the people are ready for it; but it can not be done without great disturbance of business, and this disturbance, of necessity, must reach the people. The stocks of the great industrial corporations are scattered far and wide among the people whom they are exploiting, and the holders of these stocks will hesitate long before they will consent to a remedy that will save the nation at the expense of their incomes. The craftsmen of Ephesus opposed the Christian religion

upon the ground that it would destroy their business of making idols; but that religion grew and spread, and the people no longer "bow down to wood and stone." We have gone far since that day, but human nature remains much the same, and mankind is still controlled to a considerable extent by selfish interest. But, through it all, I believe an inexorable law is at work that is moving the world upward and onward. Standing at the threshold of the heaviest responsibility ever assumed by mortal man, President Lincoln closed his first inaugural address with these immortal prophetic words:

"The mystic chords of memory, stretching from every battlefield and patriot grave to every living heart and hearthstone all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature."

I believe this sentiment is as true to-day as it was in 1861. I believe it applies with equal force to civic virtues and to military prowess. The sober, second thought of the American people can always be trusted, and a patriotic call to the discharge of the highest civic duties in defence of the form of government the fathers established will meet, I believe, as generous, if not as speedy a response as did the call to arms in defense of the Union in 1861; and the people will, whenever they appreciate the danger existing in the present crisis, sacrifice their personal interests for the preservation of the Nation which the men whose graves we decorate to-day gave up their all to save.







